VICTOR M. ONET, JR. (ON RECONSIDERATION)

IBLA 84-13 Decided August 27, 1984

Petition for reconsideration of Victor M. Onet, Jr., 81 IBLA 144, issued May 31, 1984. OR 12392 and OR 12394.

Petition for reconsideration granted; decision sustained.

1. Administrative Procedure: Rulemaking -- Statutory Construction: Administrative Construction

In deciding whether to adopt a newly enunciated rule retroactively the Board of Land Appeals has adopted the balance test which essentially rests on balancing the adverse effects of retroactivity with any statutory interest in applying the rule.

APPEARANCES: Jerome C. Muys, Esq., and John F. Shepherd, Esq., Denver, Colorado, for James B. Lynn, petitioner.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

On June 22, 1984, James B. Lynn filed a petition for reconsideration of the Board's decision in Victor M. Onet, Jr., 81 IBLA 144 (1984). We hereby grant said petition.

In Onet, the Board concluded that the Bureau of Land Management (BLM) improperly rejected Onet's noncompetitive geothermal resources lease applications for failure to file timely certain lease forms and stipulations in response to a June 3, 1983, decision requiring him to do so within 30 days of receipt. The BLM decision requiring a reply within 30 days was sent to an address supplied by a third party, and not to the address Onet had used on the face of his lease applications. We concluded that, for purposes of constructive notice (there having been no actual receipt by Onet) in accordance with 43 CFR 1810.2(b), the "last address of record" was the address listed on the applications and not the address supplied by a third party, who had not been identified as a party in interest or a duly authorized agent. We stated that "logic dictates that notice of an address must come from the applicant, or one serving as the applicant's duly authorized agent, to avoid potential abuse by third parties who might desire that the applicant not receive notice." Victor M. Onet, Jr., supra at 146 n.1. In view of the fact that Onet neither had actual notice nor could be deemed to have had constructive notice of the June 3 decision, we concluded that BLM improperly rejected Onet's lease applications for failure to comply with that decision.

In his petition for reconsideration, petitioner states that, on August 9, 1983, he filed two noncompetitive geothermal resources lease applications covering the same land included in Onet's lease applications. Petitioner contends that BLM acted reasonably in sending the June 3, 1983, decision to the address supplied by the third party and that this constituted constructive notice to Onet. Petitioner states that the third party had paid the first year's rentals for Onet's lease applications, and that this party was plainly "not the 'officious intermeddler' that the Board fears could intentionally provide incorrect information to the BLM." Petitioner concludes that the Board would require BLM to rely on the original address of record, even where, as in this case, BLM had already sent a document to that address, which had been returned. Petitioner states that, in such circumstances, Onet should bear the responsibility for failing to inform BLM as to his current address.

Petitioner also contends that in Stephen C. Ritchie, 81 IBLA 162 (1984), decided the same day as Onet, the Board acted in an "inconsistent and discriminatory" manner with respect to "similarly situated lease applicants." In Ritchie, we concluded that BLM properly rescinded a notice sent to Ritchie requesting Ritchie to submit executed lease offer forms and advance rentals to BLM. Ritchie was the second-priority applicant for the lease. A similar notice had been sent to Freeman, the first-priority applicant, but had been returned marked "Not Deliverable As Addressed, Unable To Forward." However, prior to the date that the notice of rejection of Freeman's application was returned, unclaimed, to BLM, a change of address had been filed with BLM by a third party. We held that BLM was under a duty to determine whether a change of address had been filed and that if BLM had done so it would have been aware of Freeman's new address and "would have been required to send the notice again. By failure to send another copy to the address which would have been discovered if BLM had properly examined the case record, BLM failed to serve the notice upon Freeman." Id. at 165. In effect, we held that Freeman could not be deemed to have had constructive notice when a notice mailed to the new address would have achieved actual notice. This being the case, Freeman retained his priority and the notice to Ritchie was properly rescinded.

In the Ritchie case the Board recognized the fact that the record did not indicate that the party which had supplied Freeman's change of address, was associated in any way with Freeman. However, we stated that because BLM's past practice apparently has been to accept change of address requests without determining whether the writer is authorized to represent the applicant, our ruling in Onet that BLM should not accept changes of address unless the change is made by a party in interest or duly authorized agent would apply prospectively. See, e.g., Carl Gerard, 70 IBLA 343 (1983). Petitioner contends that the Board is inconsistent in applying the Onet rule retroactively in that case and prospectively in Ritchie.

Petitioner's first contention is essentially that BLM acted reasonably in sending its decision to an address supplied by a third party where it already knew that the original address of record was not correct and that the Board would require BLM to send the decision to the original address, despite the fact that it would be a futile act. While it is quite possible that it would have been futile, it is equally possible that, in the interim, Onet had

filed a change of address or made arrangements with a party at the original address to have his mail forwarded to the proper address. BLM was at liberty to send the decision to the address supplied by the third party. However, in order to achieve constructive notice, BLM was required to send the decision to the address of record.

In Ritchie we held that since, in the past, BLM had accepted changes of address submitted by third parties, BLM was also required to send the notice to the new address. Thus, Ritchie recognized that, in reliance on BLM's past practice, an applicant may have effected an address change through a third party, not shown on the address change document or original record to be a party in interest or an authorized agent. In such case, a notice mailed to the new address could be actually received by the applicant, thus obviating the necessity for constructive notice.

Petitioner sees the results in Onet and Ritchie as inconsistent. We disagree. This Board made two pronouncements in the Onet case. The first was that a notice sent to anything other than an address of record established by a party in interest or his duly authorized agent will not serve to establish a constructive notice under the provisions of 43 CFR 1810.2(b). The second was that BLM should not accept changes of address unless the changes of address are filed by a party in interest or his duly authorized agent. On the other hand, Ritchie recognized that, since BLM had accepted changes of address from third parties, prior to our pronouncement in Onet, notices must also be sent to that address in order to establish constructive notice. Ritchie thus recognized the past practice of accepting changes of address from third parties and stated that the second finding in Onet should be applied prospectively.

In deciding whether to apply a newly-enunciated rule retroactively the Board has adopted the balancing test enunciated in Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972), which essentially rests on balancing the adverse effects of retroactivity with any statutory interest in applying the new rule. See Runnells v. Andrus, 484 F. Supp. 1234 (D. Utah 1980). We concluded that in the Ritchie case the analysis comes down in favor of prospectively applying the rule that BLM should not accept third-party changes of address. Freeman and other parties have presumably relied upon BLM's past practice of accepting changes of address submitted by a third party. Applying the second Onet ruling retroactively could bar the use of legitimate changes of address long since filed by third parties who neglected to identify their authority to act.

In summary, Onet stated that an address change submitted by a party other than a party in interest or his duly authorized agent cannot be relied upon as being correct. On the other hand Ritchie stated that, since such address changes had been accepted by BLM, the address change could not summarily be considered to be incorrect.

Petitioner desires to have our decision reversed on the basis of BLM's past practice of accepting third-party changes of address without proof of authorization. When interpreting regulations, this Board must take care to protect the rights of those who may have relied on the former practice of BLM. Thus, it would be improper for the Board to apply its clarification

of regulations so as to adversely affect someone who might have relied upon BLM's prior practice. See McDonald v. Watt, 653 F.2d 1035 (5th Cir. 1981); Runnells v. Andrus, supra. While this application of regulatory interpretation does afford Freeman some relief, by reason of the fact that Freeman had relied on BLM's past practice, petitioner did not act in any way on the basis of BLM's past practice of accepting changes of address without sufficient proof of authorization. Petitioner's actions were in no way affected by BLM's handling of Onet's change of address. Petitioner is in a posture similar to that of Roy Thames, an intervenor in McDonald v. Watt, supra. In that case the court noted:

> Moreover, Thames can claim no prejudice in this case. His offer was not drawn first. Unlike McDonald and Walsh, he can claim no detrimental reliance on any particular agency interpretation of the term "qualified"; instead he claims a right to take advantage of the confusion created by BLM's interpretation. We have no intention of creating any such right.

McDonald v. Watt, supra at 1046 n.24. Like Thames, petitioner, without any reliance on past BLM practices, is claiming a right to take advantage of the confusion created by BLM's acceptance of address changes without proof of authorization. This Board has no intention of creating such right.

By request dated June 22, 1984, petitioner also requested a stay of the effectiveness of the Board's decision in Victor M. Onet, Jr., supra, pursuant to 43 CFR 4.21(c). Because the Board hereby decides the matter of the petition for reconsideration, it is unnecessary to grant a stay.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Board is sustained.

R. W. Mullen
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge